Office Supreme Court, U.S.
FILED
JUL 6 1964
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 255

THE AMERICAN SHIP BUILDING COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

CHARLES CAVANO,
605 National City Bank
Building, Cleveland 14, Ohio.

WILLIAM S. TYSON,
821 15th Street, N.W.,
Washington 20005, D. C.,
Attorneys for Petitioner,
The American Ship Building Company.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes Involved	2
Statement of the Case	2
Reasons for Granting the Writ	5
Conclusion	11
Appendix A—Opinion of the Court of Appeals for the District of Columbia Circuit	12
B—Statutes Involved	17

AUTHORITIES CITED

Cases:

Anglo-Canadian Shipping Co., Ltd. et al, v. *Federal Maritime Commission,* 310 F. 2d 606 (1962) (CA 9)	7
Atchison T. & S. Ry. Co. v. *United States,* 295 U.S. 193, 201, 202	7
Colorado-Wyoming Gas Company v. *Federal Power Commission, Colorado Interstate Gas Co., etc., et al,* 324 U.S. 626	6, 7
Commonwealth of Puerto Rico v. *Federal Maritime Board,* 110 U.S. App. D.C. 17, 288 F. 2d 419	7
Florida v. *United States,* 282 U.S. 194, 215	7
Leonard v. *NLRB,* 197 F. 2d 435, after remand, 205 F. 2d 355 (CA 9)	9, 10
Local Union No. 12405, District 50, United Mine Workers et al, v. *Martin Marietta Corp.,* 328 F. 2d 945, (CA 7)	3
Local 357, International Brotherhood of Teamsters v. *NLRB,* 365 U.S. 667, 674, 675	6
Morand Bros. Beverage Company v. *NLRB,* 190 F. 2d 576, after remand, 204 F. 2d 592 (CA 7)	9, 10
NLRB v. *John Brown, et al,* 319 F. 2d 7 (1963); No. 558 on Petition for Certiorari	5

Page

NLRB v. *Continental Baking Co.*, 221 F. 2d 427 (CA 8) 9, 10
NLRB v. *Dalton Brick and Tile Corp.*, 301 F. 2d 886 (CA 5) 9, 10
NLRB v. *Insurance Agents International Union, AFL-CIO*, 361 U.S. 477, 487 8
NLRB v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 92 ..... 9, 10
Quaker State Oil Refining Corp. v. *NLRB*, 270 F. 2d 40 (CA 3) 10
Radio Officers' Union v. *NLRB*, 347 U.S. 17, 42, 43 (1954) 6
Saginaw Broadcasting Co. v. *Federal Communications Commission*, 68 U.S. App. D.C. 282, 96 F. 2d 554 7
Utah Plumbing and Heating Association v. *NLRB*, 294 F. 2d 145 (CA 10) 10
United States v. *Carolina Freight Carriers Corp.*, 315 U.S. 475 7
Universal Camera Corp. v. *NLRB*, 340 U.S. 474 7

Statutes:

Administrative Procedure Act (60 Stat. 237, 242, 243; 5 U.S.C. 1001 et seq.) 5, 6
National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151 et seq.) 2

Section 8(a)(1) 2, 3, 5, 6
Section 8(a)(3) 2, 3, 5, 6
Section 8(d)(4) 2, 8, 9, 10
Section 10(e) 2

United States Code, 28 U.S.C. 1254(1) 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No.

THE AMERICAN SHIP BUILDING COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioner prays that a writ of certiorari issue to reverse the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above case on April 9, 1964, affirming the decision and order of the National Labor Relations Board which was issued on June 21, 1963.

Opinions Below

The opinion of the Court of Appeals (Appendix A, infra, pp. 12-14) is reported at 331 F. 2d 839. The findings of fact, conclusions of law, and order of the National Labor Relations Board (292-308)[1] are reported at 142 NLRB 133.

---

[1] References preceded by "R" are to the Record as printed for use of the Court below, ten copies of which have been filed here.

Jurisdiction

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on April 9, 1964 (Appendix A, infra, p. 15). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and section 10(e) of the National Labor Relations Act, as amended.

Questions Presented

1. Whether the National Labor Relations Board can legally conclude that violations of sections 8(a)(1) and (3) of the National Labor Relations Act, 61 Stat. 140 (1947), as amended, 29 U.S.C. 158(a)(1) and (3) have occurred without making appropriate findings of fact or setting forth the reasons which would support such conclusions?

2. Whether, under Section 8(d)(4), the 1947 Amendment to the National Labor Relations Act, an employer lockout is a corollary of the employees' statutory right to strike?

Statutes Involved

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 et seq), are set forth in Appendix B, infra, pp. 17-20.

Statement

The petitioner, American Ship Building Company constructs and repairs ships in four shipyards on the Great Lakes (R 259). Local 374 the Chicago local of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers charged petitioner with violations of Sections 8(a)(1), (3), and (5) of the National Labor Relations Act because after an impasse had been

reached in the negotiations for a new employment agreement it had locked out its employees. The collective bargaining agreement which expired on August 1, 1961 was between the Company and the International Brotherhood of Boilermakers and seven other International Unions. Significantly, Local 374 was not a named party to this agreement.(R 260, 261, App. A. p. 16).[2]

A hearing on the charges was held by a Trial Examiner for the Board and on May 31, 1962 he recommended that the complaint be dismissed in its entirety (R 291). On June 21, 1963 the National Labor Relations Board by a three to two decision held the Company in violation of sections 8(a)(1) and (3) but dismissed charges of section 8(a)(5) violations (R 292-305). On April 9, 1964 the Court of Appeals for the District of Columbia Circuit found no basis for disturbing the conclusion of the Board that the issues were limited to employees in the Chicago shipyard of petitioner. However, the Court below upheld the enforcement order of the Board and affirmed its conclusions (App. A. pp. 12-14).

Due to seasonal factors the Great Lakes are frozen over and not navigable between November and April each year. Thus, petitioner has an extremely busy period when the Lakes are ice-bound in order to complete repairs on ships to enable them to operate during the ice free months (R. 285). For this reason a strike during the busy season would be an economic disaster for both petitioner and the shipping industry.

Negotiations on the new labor agreement had com-

---

[2] In *Local Union No. 12405, District 50, United Mine Workers et al, v. Martin Marietta Corp.*, 328 F. 2d 945, (7CA) decided March 3, 1964, rehearing denied April 3, 1964 the Court held that the contractual bargaining representative should control institution of legal proceedings. This was not done here.

menced in late May 1961 some two months prior to the expiration of the old agreement (R 50, 262-264). The Company was anxious to reach agreement because of the depressed condition of the ship building industry on the Great Lakes at that time. Furthermore, it was faced with bargaining with a Union that had struck in 1952, 1953, 1955, 1956 and 1958 or on each occasion when the collective bargaining agreement was up for renewal (R 262). There had been five strikes in eight years with the 1958 strike lasting ten weeks. In addition, there had been two wildcat strikes in 1961 at the Buffalo and Chicago shipyards (R 262).

By August 11, 1961 when an impasse had been reached in negotiations the Company had had more than twelve bargaining sessions with the Union during the preceding two months (R 262-264) and the Union had refused to submit the Company's last offer to its membership. Moreover, no further bargaining meetings were scheduled (R. 265).

The Company on the basis of the past strike record of the Union feared that a strike was imminent. The Company also firmly believed that the strategy of the Union was to delay the negotiations until a ship entered its yards for repairs which could not be completed before the onset of its busy season thus placing the Company in a position where it would become most vulnerable to strike action. The Commissioner of the U. S. Mediation Service also feared strike action and asked for assurances from the Union on this point. Such assurances as were given were restricted to a period ending with a meeting scheduled for August 7, 1961 (R 257, 302). On August 11, 1961 when the Company's lay-off at the Chicago shipyard occurred only a skeleton crew was employed (R 267, 272, 275). A new two year agreement was executed on October 27, 1961

and the employees returned to work with full restoration of their seniority and other rights (R 65, 131, 267).

Reasons for Granting the Writ

1. This case is concerned with an employer's right under the National Labor Relations Act to lockout its employees, after an impasse has been reached in collective bargaining negotiations, in order to protect and safeguard the interests of its customers and its own economic well-being. This Court has accepted for review the decision of the Court of Appeals for the Tenth Circuit in *NLRB* v. *John Brown, et al.*, 319 F. 2d 7 (1963) (Supreme Court Case No. 558). The issue in the *Brown* case involves an employer's rights under the Act with respect to lockouts and particularly with regard to hiring replacements when there is a shutdown in a multi-employer situation. Although this is not a multi-employer situation, the issues here are similar and relate quite clearly to the same over-all problem of an employer's right to utilize the lockout under the Act to protect its economic interests. Thus, this Court's decision in *Brown* will so materially affect petitioner's rights that the decision of the Court below should not be permitted to become final while the issues in *Brown* remain undecided.

2. The decision of the Court below conflicts with the decisions of this Court with respect to Sections 8(b) and (10) of the Administrative Procedure Act (5 U.S.C. 1007(b), 1009(e)(5)).

The majority of the NLRB concluded that the Company "by curtailing its operations at the South Chicago Yard with the consequent layoff of the employees, coerced employees in the exercise of their bargaining rights in violation of Section 8(a)(1) of the Act, and discriminated against its employees within the meaning of Section 8(a)(3) of the Act" (R 296). This general conclusion phrased in the

language of the statute does not conform to the requirements of Section 8(b) of the Administrative Procedure Act nor does it satisfy the rule under that Act respecting the necessity of basic and supporting findings. The NLRB did find contrary to the finding of its Trial Examiner (R 272, 273), and despite the strike proclivity of the Union (R 262, fn. 3), that the Company should have accepted the Union's oral assurances that no strike would occur and that the Company had no reasonable ground to fear a strike. No finding of anti-union motivation was made nor was there a finding that such could be inferred.

The Board failed to find how, when, where and in what manner petitioner coerced or discriminated against its employees in violating Section 8(a)(1) and (3). Nor did it make the necessary finding as to how such discrimination had encouraged or discouraged union membership. *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 42, 43 (1954); *Local 357, International Brotherhood of Teamsters* v. *NLRB*, 365 U.S. 667, 674, 675.

The Court below (Appendix A—p. 13, fn. 1) admitted that "the Board's findings did not spell out the coercive and discriminatory impact of the lockout on the rights of employees", but decided that "this consequence is implicit and the omission of explicit findings does not warrant remand." This is plainly contrary to Section 8(b) of the Administrative Procedure Act which requires not only findings but supporting *"reasons or basis therefor"*. These are wholly lacking here. Indeed, even the "findings" are lacking.

As this Court stated, "We have repeatedly emphasized the need for clarity and completeness in the basic or essential findings on which administrative orders rest" and thus "We must first know what the 'finding' is before we can give it 'conclusive weight'." *Colorado-Wyoming*

Gas Company v. *Federal Power Commission, Colorado Interstate Gas Co., etc., et al.*, 324 U.S. 626. See, also, *Atchison T. & S. F. Ry. Co.* v. *United States*, 295 U.S. 193, 201, 202; *Florida* v. *United States*, 282 U.S. 194, 215; *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475; *Universal Camera Corp. v. NLRB*, 340 U.S. 474; *Anglo-Canadian Shipping Co., Ltd. et al.*, v. *Federdl Maritime Commission* 310 F. 2d 606 (1962) (CA 9); *Commonwealth of Puerto Rico* v. *Federal Maritime Board*, 110 U.S. App. D.C. 17, 288 F. 2d 419. In the case of *Saginaw Broadcasting Co.* v. *Federal Communications Commission*, 68 App. D.C., 282, 96 F. 2d 554, 559, 563, from the District of Columbia Circuit, that Court pointed out that the absence of required findings is fatal to the validity of an administrative decision regardless of whether there may be in the record evidence to support proper findings.

Thus, it cannot correctly be said that the conclusions of the Board are supported by substantial evidence unless the exact findings upon which they are based are first known. Accordingly, the ruling by the lower Court conflicts with federal law and decisions of this and other Courts on the requirements and safeguards of our system of proper administrative procedure. The importance of this protection to all litigants cannot be overemphasized.

3. The Court below rejected petitioner's claim that its lockout of August 11, 1961 was a valid economic response in the collective bargaining process. The Court was of the view that the Board in finding the lockout illegal, was within its powers of balancing the conflicting legitimate interests of the parties. (Appendix A, p. 14).

While such a view may be proper under circumstances not present here, nevertheless we submit that it is improper under the guise of "balancing" conflicting interests to ignore completely either the interests of the employer or to prohibit protected employer conduct.

Petitioner believes that it can be fairly stated that the effect of the decision below is to render a lockout illegal per se—despite the plain statutory language and decisions of this Court to the contrary. This is clear, we believe, from the lower Court's statement in footnote 1 of its decision that coercion and discrimination are implicit in a lockout (Appendix A, p. 13). Presumably then, there is neither a need for making appropriate findings to such effect nor a need to "balance" interests since coercion and discrimination are inherent in a lockout.

Thus, the Court below has, in effect denied an employer the use of a lockout to protect his economic interests. In accomplishing this result, the decision conflicts with decisions of several other Courts of Appeal and does violence to the language of Section 8(d)(4) of the Act.

This is not a case where there is any allegation of anti-union activity or motivation. The lockout was used purely and simply to protect the economic interests of the employer's business as a corollary of the Union's right to strike.

Although petitioner considers the lockout of August 11, 1961 purely defensive, it is plain in any event from the statutory language of Section 8(d)(4) of the Act and its legislative history that an employer is free to utilize a lockout under the circumstances here present. Economic pressure during the collective bargaining process by an employer is permitted by the Act just as a labor organization may use such pressure to achieve its goals even to the point of a strike. *NLRB* v. *Insurance Agents International*, 361 U.S. 477, 487. And, the Board exceeds its authority under the Act when it attempts to forbid economic pressure in order to control the terms of the collective bargaining agreement. *Insurance Agents, supra.*

The decision below conflicts with the decision of the Court

of Appeals for the Seventh Circuit (which is the jurisdiction in which this lockout occurred) in *Morand Bros. Beverage Co.* v. *NLRB*, 190 F. 2d 576, after remand, 204 F. 2d 529, cert. denied, 346 U.S. 909, in which that Court said with reference to a lockout being a counterpart of the employees' statutory right to strike:

> "We so hold, not merely on the basis of the implied recognition in the 1947 Amendment to the Act, Section 8(d)(4), of the existence of such a right, but because the lockout should be recognized for what it actually is, i.e., the employer's means of exerting economic pressure on the Union, a corollary of the Union's right to strike." (190 F. 2d at 582).

These views of the Seventh Circuit have been referred to with favor by the Court of Appeals for the Ninth Circuit in *Leonard et al.* v. *NLRB*, 197 F. 2d 435, after remand to the Board, 205 F. 2d 355 (1953); the Court of Appeals for the Eighth Circuit in *NLRB* v. *Continental Baking Company*, (1955), 221 F. 2d 427; and the Court of Appeals for the Fifth Circuit in *NLRB* v. *Dalton Brick and Tile Co.*, 301 F. 2d 886.

This Court has made it clear that a lockout is not illegal, per se. *NLRB* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 92. The Court did not find it necessary there "to pass upon the question, whether as a general proposition, the employer lockout is the corollary of the employees' statutory right to strike" (Fn. 19, page 93, *Truck Drivers case, supra.*). Mr. Justice Brennan said,

> "The unqualified use of the term 'lockout' in several sections of the Taft-Hartley Act is statutory recognition that there are circumstances in which employers may lawfully resort to the lockout as an economic

weapon. This conclusion is supported by the legislative history of the Act." *NLRB* v. *Truck Drivers Local Union No. 449, supra,* pp. 93, 94.

Significantly, this Court pointed out that while the NLRB had recognized lockouts where economic hardship was shown as legitimate under the Act, *the lower Court had erred, in too narrowly confining the legitimate use of lockouts by employers to cases of economic hardship* (id. at p. 97).

The purpose of Section 8(d)(4), the 1947 Amendment, was to create a position of equality under the Act for employers and employees. See *Leonard et al, supra.* The instant decisions of the Board and of the Court below, inevitably render Section 8(d)(4) meaningless.

Whether an employer can use the lockout under the Act to exert legitimate economic pressure during collective bargaining is extremely important to all of the many thousands of employers in the Nation who are subject to the National Labor Relations Act, as amended. The law on this subject requires clarification. See, for example, the decisions of the Court of Appeals for the Third Circuit in *Quaker State Oil Refining Corp.* v. *NLRB,* 270 F. 2d 40, and the Court of Appeals for the Tenth Circuit in *Utah Plumbing and Heating Association* v. *NLRB,* 294 F. 2d 145 as contrasted with the views expressed by the Fifth, Seventh, Eighth, and Ninth Circuits in *Dalton Brick and Tile Co., supra, Morand Bros. Beverage Co., supra, Continental Baking Co., supra* and *Leonard et al, supra.*

Resolution of the issues in this case would do much to secure that degree of uniformity so essential to enforcement of federal law. It would also aid in creating calm and stable labor and industrial relations.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES CAVANO,
605 National City Bank
Building, Cleveland 14, Ohio.

WILLIAM S. TYSON,
821 15th Street, N.W.,
Washington 20005, D. C.,
Attorneys for Petitioner,
The American Ship Building Company.

July 6, 1964.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18011

LOCAL 374, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

No. 18056

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

THE AMERICAN SHIP BUILDING COMPANY, *Respondent*.

On Petition to Review and Modify and on Cross-Petition to Enforce an Order of the National Labor Relations Board

Decided April 9, 1964

Mr. Bernard M. Mamet, with whom *Mr. Theodore J. St. Antoine* was on the brief, for petitioner in No. 18011.

Mr. Ira M. Lechner, Attorney, National Labor Relations Board, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Messrs. Arnold Ordman*, General Counsel, *Dominick L. Manoli*, Associate General Counsel, *Marcel Mallet-Prevost*, Assistant General Counsel, and *James C. Paras*, Attorney, National Labor Relations Board, were on the brief, for respondent in No. 18011 and petitioner in No. 18056. *Mr. Herman M. Levy*, Attorney, National Labor Relations Board, also entered an appearance for petitioner in No. 18056 and respondent in No. 18011.

Mr. William S. Tyson for respondent in No. 18056.

Before BURGER, WRIGHT and MCGOWAN, *Circuit Judges.*

PER CURIAM: No. 18011 reaches us on the petition by the Union, the charging party, to review and enlarge an order of the Board issued June 21, 1963 pursuant to Section 10(c), National Labor Relations Act, 61 STAT. 146 (1947), 29 U.S.C. § 160(c) (1958). The Board found that the Intervenor, The American Ship Building Company, by locking out employees upon the expiration of the existing contract and while negotiations for renewal were pending, violated Sections 8(a)(1) and (3) of the National Labor Relations Act, 61 STAT. 140 (1947), as amended, 29 U.S.C. § 158(a)(1)(3) (1958). We find no basis for disturbing the Board's conclusion that the issue presented to it was limited to the layoff of employees at the South Chicago plant; other charges were not involved. *Cf. International Union of Electrical Radio and Machine Workers, AFL-CIO* v. *National Labor Relations Board,* 110 U.S.App.D.C. 91, 289 F. 2d 757 (1960).

No. 18056 reaches us on the petition of the Labor Board for enforcement of the same order against The American Ship Building Company as respondent in No. 18056. American Ship Building contends that enforcement should be withheld because the Board's findings were inadequate [1] and were not supported by substantial evidence, and because the lockout did not violate the Act in the circumstances found by the Board.

The question presented initially is narrowly whether the record contains evidence to support the Board's findings. On the whole record, and allowing for the important place accorded to the Board's special experience, we conclude that the Board's finding that respondent had no reasonable basis for fearing a strike is not without the requisite record support. See *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474 (1951). Respondent alternatively contends that in the circum-

[1] Although the Board's findings did not spell out the coercive and discriminatory impact of the lockout on the rights of employees, we think this consequence is implicit and the omission of explicit findings does not warrant remand.

stances shown here a lockout was permissible as a valid economic response in the collective bargaining process; the Board rejected this contention. "The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *National Labor Relations Board* v. *Truck Drivers Local No. 449, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A.F.L.*, 353 U.S. 89, 96 (1957). We find no basis for disturbing the Board's conclusions.[2]

Affirmed.

[2] The Board's Decision and Order are reported at 142 N.L.R.B. No. 173 (1963).

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1963

No. 18,011

LOCAL 374, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

No. 18,056

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

THE AMERICAN SHIP BUILDING COMPANY, *Respondent*

On Petition to Review and Modify and on Cross-Petition to Enforce an Order of the National Labor Relations Board

Before: BURGER, WRIGHT and MCGOWAN, *Circuit Judges*.

JUDGMENT

These cases came on to be heard on the record from the National Labor Relations Board and on a petition to review and modify and a cross-petition for enforcement of the order of the National Labor Relations Board herein, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the order of the National Labor Relations Board on review in these cases is hereby affirmed, and will be enforced.

Pursuant to Rule 38(1) the National Labor Relations Board shall within 10 days hereof serve and file a proposed enforcement decree.

Per Curiam.

Dated: April 9, 1964.

(Filed April 9, 1964)

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1963

No. 18,011

LOCAL 374, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

No. 18,056

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

THE AMERICAN SHIP BUILDING COMPANY, *Respondent*

Before: BURGER, WRIGHT and MCGOWAN, *Circuit Judges*, in Chambers.

ORDER

On consideration of the motion of respondent in Number 18,056, for leave to submit pertinent case citation in *Local 12450, District 50, United Mines Workers, et al.* v. *Martin Marietta Corp.* (CA 7) (3/3/64) 55 LRRM 2592, CCH 49 LC par. 18,798, it is

ORDERED By the Court that the motion is hereby granted.

Per Curiam.

Dated: April 28, 1964.

(Filed April 28, 1964)

APPENDIX B

STATUTES INVOLVED

The National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Secs. 151 et seq.), provides in pertinent part as follows:

"Sec. 8.

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title;

* * * * * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, that nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made; and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with section 159(f)—(h) of this title, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the au-

thority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membershisp;

* * * * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

* * * * * * *

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:" (61 Stat. 140; 5 U.S.C. 158(a)(1), (3), (d)(4)).

* * * * * * *

Sections 8(b) and 10(e)(5) of the Administrative Procedure Act (5 U.S.C. 1007(b), 1009(e)(5); 60 Stat. 242, 243) are as follows:

Sec. 8—"In cases in which a hearing is required to be conducted in conformity with section 1006 of this title—

* * * * * * *

(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof. (June 11, 1946, ch. 324, § 8, 60 Stat. 242.)

* * * * * * *

Sec. 10—"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

* * * * * * *

(e) Scope of review.

So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel

agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. (June 11, 1946, ch. 324 § 10 60 Stat. 243.)"